

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (CKK)

Next Court Deadline:
None

JOINT MOTION BY *AMICI CURIAE* CCIA AND SIIA
FOR LEAVE TO INTERVENE FOR PURPOSES OF APPEAL

The Computer & Communications Industry Association (“CCIA”) and the Software & Information Industry Association (“SIIA”) (collectively “Joint Movants”), by their attorneys and pursuant to Rule 24 of the Federal Rules of Civil Procedure, hereby jointly move for leave to intervene for purposes of appeal. The grounds for this motion, as more fully set forth in the accompanying Memorandum of Points and Authorities, are that Joint Movants have a direct and immediate interest in the outcome of this case and that, absent their participation, appellate review of the Court’s judgment and “public interest” determination will be foreclosed.

WHEREFORE, this motion should be granted and Joint Movants CCIA and SIIA should be authorized to intervene as parties in order to jointly appeal the November 12, 2002 Final Judgment of the Court. A form of proposed Order is attached pursuant to Local Rule LCvR7.1(c).

Respectfully submitted,

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Dated: December 20, 2002

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (CKK)

PROPOSED ORDER

UPON CONSIDERATION of the Joint Motion by the Computer & Communications Industry Association and the Software & Information Industry Association (collectively “Joint Movants”) for Leave to Intervene For Purposes of Appeal, and of the Memorandum of Points and Authorities submitted in support thereof, and good cause having been shown therefore, it is this ___ day of December, 2002, hereby

ORDERED that the Joint Motion be and hereby is GRANTED. Joint Movants are added as intervenor parties to the captioned civil action solely for purposes of appealing this Court’s November 12, 2002 Final Judgment.

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (CKK)

Next Court Deadline:
None

**MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF JOINT MOTION BY *AMICI CURIAE* CCIA AND
SIIA FOR LEAVE TO INTERVENE FOR PURPOSES OF APPEAL**

The Computer & Communications Industry Association (“CCIA”) and the Software & Information Industry Association (“SIIA”) (collectively “Joint Movants”), by their attorneys and pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Rule LCvR7.1(c), respectfully submit this memorandum in support of their joint motion for leave to intervene for purposes of appeal.

INTRODUCTION

Joint Movants are two trade associations granted *amicus curiae* status to file briefs and present oral argument in proceedings before this Court earlier this year.¹ At that time, the Court reserved ruling on whether intervention for purposes of appeal was warranted, concluding that the question was premature before any “public interest” determination under the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the “Tunney Act”). With a Final Judgment now

¹ Memorandum Opinion and Order, No. 98-1232 (D.D.C. Feb. 28, 2002) (“CCIA Order”); Memorandum Opinion and Order (D.D.C. Feb. 28, 2002) (“SIIA Order”).

entered in this case on November 12, 2002,² Joint Movants move for leave to intervene solely for purposes of seeking appellate review by the United States Court of Appeals for the D.C. Circuit.

This joint motion by Tunney Act *amici*, both of whom filed extensive comments classified as “major” by the government, will result in an efficient procedure consistent with Tunney Act precedent and practice. In every reported Tunney Act case that presented serious opposition to an important government antitrust settlement, federal district courts have authorized post-judgment intervention for purposes of appeal. This case hinges on interpretation of the Court of Appeals’ *en banc* opinion in *Microsoft III*.³ Accordingly, the D.C. Circuit itself can best decide whether this Court’s November 12 judgment is consistent with its *en banc* opinion. We respectfully suggest the Court of Appeals should be given the opportunity to do so through grant of this motion.

INTERESTS OF JOINT MOVANTS

Joint Movants collectively represent a comprehensive cross-section of the computer hardware and software industries, including many of the classes of entities — Independent Software Vendors (“ISVs”), Personal Computer Original Equipment Manufacturers (“OEMs”), Independent Hardware Vendors (“IHVs”), Internet Access Providers (“IAPs”), etc. — affected by the decree. Joint Movants have an extensive record of participation at the trial and appellate levels in each of the antitrust cases brought by the government against Microsoft since 1994. We have presented substantial argument and evidence supporting our view that the decree entered by

² Final Judgment, *United States v. Microsoft Corp.*, No. 98-1232 (CKK), 2002 U.S. Dist. LEXIS 22864 (D.D.C. Nov. 12, 2002); *see* Memorandum Opinion, 2002-2 Trade Cas. (CCH) ¶ 73,851, 2002 U.S. Dist. LEXIS 21097 (D.D.C. Nov. 1, 2002) (the “Opinion” or “Slip Op.”).

³ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001).

this Court satisfies neither the Tunney Act's "public interest" standard nor the D.C. Circuit's holdings in *Microsoft III*.

CCIA is an association of more than 35 computer technology and telecommunications companies that range from small entrepreneurial firms to some of the largest members of the industry. CCIA's members are customers, partners and competitors of Microsoft, and include equipment manufacturers, software developers, providers of electronic commerce, networking, telecommunication and online services, resellers, systems integrators, and third-party vendors. For nearly 30 years, CCIA has supported antitrust policy that ensures competition and a level playing field in the computer industry. CCIA has participated as an *amicus* in every stage of the Microsoft case, from the 1995 consent decree and the *Microsoft III* appeal to this Court's Tunney Act proceedings. CCIA's Tunney Act submissions included affidavit evidence from Nobel Laureate Joseph Stiglitz, an extensive filing analyzing the settlement's failure to adhere to the logic and requirements of the Court of Appeals' ruling, and affidavit evidence indicating potential violations in Microsoft's disclosures under Section 16(g) of the Tunney Act.⁴ CCIA's membership includes ISVs, IHVs, OEMs and middleware providers.

SIIA is the principal trade association of the software code and information content industry, with more than 500 members. SIIA provides global services in government relations, business development, corporate education, and intellectual property protection to leading software and information companies. Among SIIA's key public policy goals is the promotion of competition in the software industry. SIIA has advanced these principles in a variety of fora, including the federal courts, and was one of two associations granted leave to file briefs *amici cu-*

⁴ CCIA Comments on Proposed Decree (Jan. 29, 2002) ("CCIA Comments"); *see* Reply Brief of Amicus Curiae Computer & Communications Industry Assn., No. 98-1232 (D.D.C. March 11, 2002) ("CCIA Reply Brief").

riae in prior phases of this case.⁵ SIIA's Tunney Act comments included an extensive analysis of how the API and related information disclosure sections of the proposed decree were deficient.⁶ SIIA's membership includes ISVs and middleware providers.

ARGUMENT

I. THIS COURT SHOULD PERMIT CCIA AND SIIA TO INTERVENE FOR PURPOSES OF APPEAL IN ORDER TO ENSURE APPELLATE REVIEW OF ITS TUNNEY ACT DECISION IN THIS EXTREMELY IMPORTANT GOVERNMENT ANTITRUST CASE

Tunney Act commenters who wish to appeal entry of a government antitrust settlement must first be granted intervenor status in the district court. *United States v. LTV Corp.*, 746 F.2d 51 (D.C. Cir. 1984).

[T]hose who object to the entry of a consent judgment must seek to intervene in the proceedings (either before or after entry of the judgment) as a condition of taking an appeal. To gain status as an intervenor, the would-be appellant must first establish that participation by the intervenor would aid the court in making its public interest determination under the APPA [*i.e.*, the Tunney Act].

Id. at 53; *see United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1290 (D.C. Cir. 1980).

This Court and others have liberally applied this standard, along with the related requirements of Rule 24, to consistently permit intervention for purposes of appeal by serious petitioners in substantial antitrust settlements like this case.

⁵ *See, e.g.*, Brief on Remedy of *Amici Curiae* Computer & Communications Industry Association and Software & Information Industry Association, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 19, 2000); Brief of Software & Information Industry Association and Computer & Communications Industry Association As *Amici Curiae* Supporting Jurisdiction, *Microsoft Corp. v. United States*, No. 00-139 (S. Ct. filed Aug. 15, 2000).

⁶ Comments of Software & Information Industry Association on Proposed Final Judgment (Jan. 28, 2002) ("SIIA Comments"); *see* The Software & Information Industry Association's Reply Brief, No. 98-1232 (D.D.C. March 11, 2002) ("SIIA Reply Brief").

A. Sound Exercise of the Court’s Discretion Compels the Grant of Rule 24(b) Permissive Intervention For Purposes of Appeal

Permissive intervention under Rule 24(b) for the sole purpose of appeal is the appropriate and sound response of a district court to objections to its determinations under the Tunney Act. This is true even where prior Tunney Act intervention was denied in favor of *amicus* participation only.⁷ The D.C. Circuit held in *LTV* that intervention in a Tunney Act case requires a showing that “participation by the intervenor would aid the [district] court in making its public interest determination under the [Tunney Act].” *LTV*, 746 F.2d at 54. This Court has already made such a finding with regard to Joint Movants in permitting participation as *amici*. Consistent with the broad grant of discretionary authority in the Tunney Act for district courts to fashion appropriate procedures,⁸ Rule 24(b) also counsels that limited intervention solely for appeal purposes is appropriate in this case.

Although the D.C. Circuit “has no holding on the standard for intervention for purposes of appeal in a Tunney Act case,” *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997), the consistent practice of district courts in substantial government antitrust settlements demonstrates the propriety of allowing Joint Movants to intervene for appellate purposes. For instance, in the *AT&T* proceedings in the early 1980s, the late Judge Harold Greene “authorized [a number of] private parties, many of whom had filed briefs in the proceeding, to intervene for purposes of appealing” the district court’s final judgment. *United*

⁷ Many district courts have denied requests for general intervention as a Tunney Act party while later granting requests by the same parties to intervene for purposes of appeal. Indeed, even “denial of intervention as of right does not automatically mandate a denial of permissive intervention” under Rule 24(b). *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3rd Cir. 1986); *McKay v. Heyison*, 614 F.2d 899, 906 (3d Cir. 1980). Consideration of post-judgment intervention for purposes of appeal is a separate inquiry that is not prejudiced by a denial of intervention during the proceedings. See *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1476-80 (11th Cir. 1993).

⁸ The Tunney Act permits a district court to authority to approve “full or limited participation in proceedings before the court by interested persons or agencies . . . in any other manner and extent which serves the public interest as the court may deem appropriate.” 15 U.S.C. § 16(f).

States v. American Tel. & Tel. Co., 714 F.2d 178, 180 (D.C. Cir. 1983). As a former Chief Judge of the D.C. Circuit wrote, this approach has developed in order to provide assurance that the Court of Appeals can “review and correct a district court’s ‘public interest’ determination . . . when a non-party well-situated to demonstrate that [the determination is invalid] seeks to subject that determination to appellate review.” *Mass. School of Law*, 118 F.3d at 785 (Wald, J., concurring). Indeed, the D.C. Circuit has made fairly plain, as a string of subsequent decisions in this district and elsewhere agrees, that a district court generally *should* grant intervention for purposes of appeal in order to avoid “foreclos[ing] appellate review” of these important antitrust cases.⁹

1. The Court of Appeals Should Have an Opportunity to Review the Important Issues Raised by This Case

The importance of this case is beyond dispute. The D.C. Circuit’s decision upheld Microsoft’s antitrust liability for exclusionary conduct that the government has been investigating and prosecuting for almost a decade. It is undisputed that computing is a cornerstone of the global economy, and personal computers remain at the core of computing. Microsoft itself boasts that “Windows is very important to the Nation’s economy.” *See, e. g.*, Microsoft’s Summ. Resp. to Plaintiff’s Proposed Final Judgment at 4 (D.D.C. May 10, 2000) (“Summ. Resp.”). More than 100 million personal computers are sold each year, almost all of which run Microsoft Windows.¹⁰ The “millions of consumers who use Microsoft’s products,” *id.*, daily pay

⁹ The Court of Appeals emphasized that the *LTV* intervention procedure will not “foreclose all appellate review of antitrust consent judgments” because “[o]bjectors to a consent decree may seek to intervene for the limited purposes of appeal.” *LTV*, 746 F.2d at 54 n.9.

¹⁰ *The Best Is Yet to Come*, remarks by Bill Gates to WINHEC 2000, New Orleans, Apr. 25, 2000, <<http://www.microsoft.com/billgates/speeches/04-25winhec00.htm>>; *Gartner’s Dataquest Says Worldwide PC Industry Experienced 15 Percent Growth in First Quarter 2000*, press release, Apr. 24, 2000, <<http://gartner12.gartnerweb.com/dq/static/about/press/pr-b200019.html>>.

the price of Microsoft's suppression of innovation through increased operating system costs and lack of consumer choice.

Joint Movants are uniquely positioned to present this Court's Tunney Act public interest determination to the Court of Appeals for appellate review. In their comments, *amicus* briefs and oral arguments, Joint Movants raised numerous legal and factual issues that have a direct impact on consumer welfare and which, in the absence of intervention, cannot be considered by the D.C. Circuit. Without grant of this motion, the Court of Appeals will almost surely have no opportunity to decide whether entry of this decree is in the "public interest." None of the existing parties is disposed (or permitted) to appeal the approval of their settlement. Joint Movants believe they are the only potential parties prepared to shoulder the significant costs associated with an appeal. Accordingly, as Judge Friedman most recently explained for this Court, because the "presentation to the Court of Appeals" of important Tunney Act antitrust issues "should not be foreclosed by this Court," *United States v. Thomson Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,735, 1997 U.S. Dist. LEXIS 1893, at *15 (D.D.C. 1997), intervention by non-governmental parties for purposes of appeal should be permitted.

The consistent practice of this Court in major Tunney Act cases has been to liberally authorize commenters who opposed the government's antitrust settlements to intervene for purposes of appeal. *AT&T* is perhaps the best example. *United States v. American Tel. & Tel Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 101 (1983). There, a large number of private and state governmental entities filed motions to intervene in the litigation and subsequent Tunney Act proceedings, but "the Court rejected all these requests at the time they were made." 552 F. Supp. at 218. Judge Greene found, however, that "post-judgment proceedings" presented a "different situation" with respect to the appropriateness

of third-party participation. Noting that grant of full intervention in Tunney Act cases is wholly discretionary and should be sparingly granted, the district court nonetheless held that proper enforcement of the decree required that AT&T's competitors be granted intervenor status for purposes of appeal. 552 F. Supp. at 219-20.

This case strongly justifies Rule 24(b) intervention because the linchpin of the Tunney Act "public interest" question in this case is the Court of Appeals' holding on the scope of an appropriate antitrust remedy. This Court's Opinion repeatedly recognized that the Court of Appeals' decision "provide[d] an essential foundation to this Court's analysis," Slip. Op. at 7, and controlled the scope of remedy by affirming "the middleware theory of liability pursued in this case." *Id.* at 35. Not surprisingly, the Court's Opinion devoted 17 pages exclusively to summarizing and recounting "the pertinent portions of the appellate opinion in this case" because it recognized that "the opinion of the appellate court provides the underpinning for this Court's analysis of the proposed decree." *Id.* at 10.¹¹ Indeed, this Court dismissed an independent lawsuit, brought by one Tunney Act commenter to challenge the government's statutory compliance, adding the explicit caveat that "if Plaintiff does not agree with the Court's sufficiency determination, that determination can be challenged on appeal." *American Antitrust Institute, Inc. v. Microsoft Corp.*, No. 01-138 (CKK), slip op. at 21 n.11 (D.D.C. Feb. 20, 2002).

While the Court disagreed with the substantive Tunney Act arguments advanced by Joint Movants, we respectfully submit that the issues to be raised on appeal are serious and credible, and that our intervention will greatly assist the Court of Appeals' review of the public interest

¹¹ In its substantive evaluation of the proposed decree, the Court repeatedly returned to the Court of Appeals' holdings in *Microsoft III* to discern whether the relevant provisions adequately addressed the Court of Appeals' opinion as to the anticompetitive effect of Microsoft's conduct and its scope. *See, e.g.*, Slip Op. at 36 (regarding Section III.F provisions precluding retaliation); at 47 (regarding Section III.H requirements for competitive icons on the desktop); at 76-77 (discussing the question of "interoperability" with respect to Sections III.D and III.E).

determination required in Sherman Act settlements.¹² Yet here, neither the United States nor Microsoft will appeal, and the Court de-consolidated the companion case of *New York v. Microsoft Corp.* (No. 98-1233) in which Massachusetts and West Virginia have filed notices of appeal. Hence, “[w]ithout the intervention of [Joint Movants] *no party will be in a position to present these issues to the Court of Appeals.*” *United States v. Thomson Corp.*, *supra*, 1997 U.S. Dist. LEXIS 1893, at *15 (emphasis supplied).

Judge Friedman’s decision in *Thomson* is highly instructive on the question of intervention for purposes of appeal. After approving the Justice Department’s settlement of a Clayton Act antitrust complaint against a merger between legal publishers Thomson and West, the district court disposed of two renewed motions to intervene for purposes of appeal. The moving entities were third-party competitors who had been permitted to participate as *amici* (but denied intervention) in the Court’s substantive Tunney Act proceedings.

Judge Friedman denied the renewed motion by Lexis, one of the merging defendants’ chief competitors, on the ground that because Lexis had “reversed its earlier stance and now support[ed] entry” of the decree, it was “no longer in a position to ensure that the Final Judgment is properly tested in the appellate crucible.” *Id.* at *15. A second, smaller competitor, however, continued to object to the settlement, arguing that the district court “misinterpreted or misapplied the Court of Appeals’ recent decision in *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).” *Id.* (citation in original). Thus, as “the issues raised by this case are important, and their presentation to the Court of Appeals should not be foreclosed by this Court,” *id.*, Judge Friedman approved intervention for purposes of appeal under Rule 24(b).

CCIA and SIIA have made similar arguments that this Court “misinterpreted or misapplied” the Court of Appeals’ decision in *Microsoft III*. We believe that if permissive intervention

¹² See, e.g., CCIA Comments at 1-2; SIIA Comments at 12.

for purposes of appeal was appropriate by a single small competitor in *Thomson*, the coordinated, joint intervention of the trade associations representing nearly all of the major competitors and other third-parties affected by the *Microsoft* decision is plainly justified for the limited purpose of appeal. Indeed, this is an even stronger case for intervention than *Thomson*. In *Thomson*, a small competitor challenged an antitrust settlement as inconsistent with an appellate decision in *another* case. Here, groups representing virtually the entire computer industry are challenging a settlement as inconsistent with an *en banc* appellate decision in the *same* case. It is also important that the Court of Appeals already has before it this Court's judgment in *New York v. Microsoft*; absent grant of this motion, the D.C. Circuit would therefore not be in a position to review the full context of this Court's reasoning and analysis in these closely related cases.

2. Joint Movants Fully Meet The Permissive Intervention Criteria of Fed. R. Civ. P. 24(b)

Permissive intervention under the Federal Rules is authorized by a district court “when an applicant’s claim or defense and the main action have a question of law or fact in common,” and where intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b). There is no question that these criteria are satisfied by Joint Movants.

First, Joint Movants include entities with actual and potential legal claims against Microsoft — arising out of facts substantially the same as those litigated in this case — as well as a virtual “Who’s Who” of nearly every developer of middleware software in the United States. Our members’ business futures will plainly be impacted substantially by the shortcomings of the decree and many of its substantive provisions, *i.e.*, API disclosure, Communications Protocol licensing, OEM and end user flexibility to use non-Microsoft middleware, just to name a few.

Moreover, as independent software vendors and middleware providers, our members' products are completely reliant on interoperability with Microsoft's monopoly operating system. Our member companies are currently making substantial, long-term research and development investment decisions based on the provisions of the Final Judgment. Our member companies need precision and certainty that they will have the necessary information to develop their products and that they can distribute those products through the OEM distribution channel in order to reach their customers. Consequently, Joint Movants have a direct business interest in the clarity, enforceability and effectiveness of the decree, which governs each of these crucial economic factors. That our "claim[s] or defenses" share common questions with "the main action" is thus hardly debatable.¹³

Second, intervention for purposes of appeal does not risk any delay or prejudice to the government or Microsoft. The November 12 Final Judgment operates unaffected by any pending appeal, and the possibility of reversal by the D.C. Circuit is of course not "prejudicial" as a matter of law. The coordinated joint intervention of a group comprising a comprehensive cross-section of the competitive computer hardware and software industries is hardly the sort of "piling on" and "concomitant issue proliferation and confusion" that counsels against permitting general Tunney Act intervention in the substantive proceedings themselves. *Mass. School of Law*, 118 F.3d at 782. Intervention for the limited purpose of appeal does not present any of the delay, burden or unnecessary duplication concerns that motivated this Court to strictly circumscribe

¹³ Although "the words claim or defense are not to be read in a technical sense, but only require some interest on the part of the applicant," *Dow Jones & Co. v. United States Dep't of Justice*, 161 F.R.D. 247 (S.D.N.Y. 1995), Joint Movants clearly have claims which share common questions with those addressed in this case. Indeed, because the decree will plainly affect our economic interests, Joint Movants have the sort of "direct personal pecuniary interest" in this case which is *more than* that required to support permissive intervention. *Diamond v. Charles*, 476 U.S. 54, 67 (1986) (O'Connor, J., concurring) (intervenor "need not have a direct personal pecuniary interest in the subject matter of the litigation," but merely be able "to sue or be sued in an action that would share common questions of law or fact with those at issue in the litigation").

Joint Movants' participation as *amici* during the Tunney Act proceedings themselves. *See* SIIA Order at 3-4.

As representatives of the broadest group of competitors and other interested parties in this case, Joint Movants have the requisite direct, personal economic stake in the outcome of a decree process that will structure their relations with the defendant for years to come. As “consumers” of the decree’s provisions, *i.e.*, as ISVs, OEMs, IHVs and other entities whose ability to interoperate, and indeed coexist, with the monopoly PC operating system will be determined almost exclusively by the decree’s terms, Joint Movants have an economic interest in the clarity, scope and enforceability of this antitrust judgment that is unmatched by any other *amicus* or Tunney Act commenter before this Court.

This Court suggested earlier that CCIA articulated only an inchoate interest in broadly participating in antitrust enforcement against Microsoft. *See* CCIA Order at 2-3. That is not the interest on which the Joint Movants are basing their present motion. Rather, Joint Movants submit that because our members must create products that are compatible with Microsoft’s Windows operating system, the decree’s provisions, for example those governing interoperability, will constrain our economic and business options. Additionally, Joint Movants are concerned, as made clear in our *amici* briefs and Tunney Act comments, that the decree allows Microsoft to continue and actually expand a variety of anticompetitive practices, including those (such as commingling of code) expressly held unlawful by the D.C. Circuit. We are thus threatened with harm from the decree itself. These are specific interests that arise only in a post-judgment environment, and that are qualitatively different from any general interest in government antitrust enforcement policy or litigation. *Cf. Mass. School of Law, supra*, 118 F.3d at 781 (find-

ing “no right of intervention . . . for purposes of a general appeal” absent threatened harm to the movant from implementation of the decree).

3. Joint Movants Have Presented Serious Issues Regarding the Propriety of the Decree Entered By This Court

In our comprehensive comments and the limited *amicus* briefs we were permitted to file, Joint Movants raised serious issues that call into question whether the decree entered by this Court suffers from potential defects of “clarity,” “enforce[ment]” and “harm to third parties.” *See* Slip Op. at 6 (quoting *Microsoft I*); *Mass. School of Law*, 118 F.3d at 783 (intervention warranted “if the would-be intervenor can point to the specific defects identified by [*Microsoft I*]”). Joint Movants not only *can* point to the specific defects in the decree entered by this Court, we have done so in our Tunney Act filings.

Among the defects we respectfully submit should be reviewed by the Court of Appeals are: (1) whether the decree’s provisions on API disclosure and OEM flexibility are ambiguous or unenforceable;¹⁴ (2) whether the law of this case and on antitrust remedies was followed;¹⁵ (3) specifically, whether the remedial precedents established by the Supreme Court and cited by the Court of Appeals were properly applied in this case;¹⁶ (4) whether the decree, had it been in effect from 1995-98, would have prevented the predatory conduct by Microsoft found unlawful by the Court of Appeals in this case;¹⁷ (5) whether, and if so to what extent, deference is owed to

¹⁴ *See, e.g.*, SIIA Reply Brief at 1 (The API terms “of the proposed decree alone warrant the Court’s rejection of the entire settlement, even under the *Microsoft I* standard, since the API disclosures are hopelessly vague, ambiguous, and unenforceable.”)

¹⁵ *See, e.g.*, CCIA Reply Brief at 10-12; SIIA Reply Brief at 3-4.

¹⁶ *See, e.g.*, CCIA Reply Brief at 13 (“Although the D.C. Circuit held, in no uncertain terms, that Microsoft illegally commingled the code of IE with that of the operating system in order to maintain its monopoly, the [proposed decree] permits Microsoft to continue this violation.”); SIIA Reply Brief at 5-6.

¹⁷ *See, e.g.*, CCIA Comments at 11 (“DOJ describes the obligations in the RPFJ as if they would have stopped Microsoft’s suppression of Netscape. . . . The RPFJ does not achieve those goals.”).

the Department of Justice in a post-trial, post-appellate setting;¹⁸ and (6) whether the government and Microsoft complied with their procedural obligations under the Tunney Act.¹⁹

As the Court is aware, many of the legal issues raised by this landmark case are ones of first impression, as there has never been a Tunney Act settlement following a successful trial and appeal of a monopolization judgment. “[T]he existence of a substantial unsettled question of law is a proper circumstance for allowing intervention and appeal.” *Associated Builders, Saginaw Valley Chapter v. Perry*, 115 F.3d 386, 391 (6th Cir. 1997). Although this Court disagreed with our legal analysis, Joint Movants respectfully suggest that appeal of this case is necessary in order to promote the administration of justice. Joint Movants believe they are likely to be the only entities who will be requesting leave to intervene for purposes of appeal, and thus that without our intervention, no party will be in a position to raise these substantial issues with the Court of Appeals. Joint Movants therefore urge the Court to follow the consistent practice in Tunney Act cases and grant this motion in order not to foreclose appellate review of this historic Sherman Act monopolization remedy.

B. The Court Is Required To Grant Intervention For Purposes Of Appeal “As Of Right” Under Rule 24(A)

Joint Movants alternatively request that the Court authorize intervention for purposes of appeal as of right under Fed. R. Civ. P. 24(a). We emphasize, however, that we believe the foregoing analysis of the application of Rule 24(b) in Tunney Act appeals is sufficient, and only address intervention as of right in the event this Court decides that permissive intervention should not be granted.

¹⁸ See, e.g., SIA Reply Brief at 2-3 (“This Court must give deference to the law of this case – the Court of Appeals’ decision – and not give deference to the Department [of Justice].”); CCIA Comments at 19-33.

¹⁹ See, e.g., CCIA Reply Brief at 3; CCIA Comments at 26-32. See also ProComp Comments at 80-82 (Tunney Act procedural requirements for (a) disclosure of “determinative” documents, (b) defendant’s “communications” with Executive Branch and Congress, and (c) consideration of “alternatives” to settlement not complied with by Justice Department and Microsoft.)

This Court held that neither CCIA nor any other movant had a right to intervene in the Tunney Act proceedings themselves. *See* CCIA Order at 3 n.2. But the circumstances are different now and, in this joint motion, no “absolute right” to intervene in Tunney Act cases is claimed. *Id.* (quoting *AT&T*, 552 F. Supp. at 218 n.362). To the contrary, Joint Movants are only suggesting that a more focused and detailed review of our interests, and analysis of how the Court’s judgment will affect those interests, reveals that we meet the Rule 24(a) criteria for intervention as of right for the limited purpose of appeal.

Rule 24(a) provides that “anyone shall be permitted to intervene ... when the applicant claims an interest relating to the property or transaction which is the subject of the action ... unless the applicant’s interest is adequately represented by existing parties.” In reviewing various intervention motions at the outset of the Tunney Act proceedings, the Court properly applied *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998), to evaluate whether Rule 24(a) required intervention as of right. *See, e.g.*, CCIA Order at 2-3. In that case, the Court of Appeals established a four-part standard, based on the language of Rule 24, under which intervention as of right is granted where would-be intervenors demonstrate that (1) the motion is timely, (2) they have “an interest relating to the property or transaction which is the subject of the action,” (3) denial of intervention will “impair or impede the applicant’s ability to protect that interest,” and (4) their interest is not “adequately represented by existing parties.” 140 F.3d at 1074 (quoting Fed. R. Civ. P. 24(a)). The Court found the pre-hearing motions were timely,²⁰ but was not persuaded the remaining prongs of the test had been satisfied. And the

²⁰ The present motion is timely because it is filed well within the time set forth in the Federal Rules of Appellate Procedure for appeal from a district court’s final judgment. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 612 F.2d 131, 134 (3d Cir. 1979).

Court found that intervention for purposes of appeal was premature. Joint Movants submit the test for Rule 24(a) intervention is now met.

1. Joint Movants Have a Direct and Immediate Interest in the Judgment

CCIA and SIIA have a demonstrable interest in the antitrust remedy imposed on Microsoft. The Rule 24(a) interest requirement, which the Court of Appeals in *Mova Pharmaceutical* likened to a simple question of Article III standing, is satisfied where movants have a “legally protectable” interest in the terms of an antitrust settlement. 140 F.3d at 1074 (quoting *Southern Christian Leadership Conference v. Kelly*, 747 F.2d 777, 779 (D.C. Cir. 1984)). As trade associations representing software developers, equipment manufacturers and Internet access providers, Joint Movants have a cognizable interest in ensuring that the remedy in this case restores effective competition to the PC ecosystem.

The Court of Appeals affirmed Microsoft’s Section 2 liability in large part on the basis of Microsoft’s conduct with respect to competitors represented by Joint Movants. *Microsoft III*, 253 F.3d at 67 (affirming district court’s findings as to the harm caused to Netscape Navigator through browser-OS code commingling); *id.* at 77 (holding that the deception of Java developers constituted unlawful monopolization). Dozens of additional companies that are members of one or more of our associations also have suffered harm as a result of Microsoft’s unlawful conduct. The economic welfare of these companies hinges on whether procompetitive conditions exist in the PC ecosystem, which itself hinges on whether Microsoft’s unlawful monopolization has been appropriately remedied.

2. Joint Movants Require Intervention in Order to Protect Their Interest

With entry of the Nov. 12 Final Judgment, this Court has established the competitive framework for the computing and information technology industry for years to come. Absent

appeal, this judgment is final and will not be subject to further judicial review. As Joint Movants explain herein and in their Tunney Act comments, however, substantial concerns remain regarding the efficacy of the decree. Microsoft's competitors continue to transact business and provide products outside the realm of the Windows monopoly. Unless permitted to intervene and seek appellate review of the Court's judgment, Joint Movants will be powerless to affect the substantive terms of the decree that structure their necessary relationship with Microsoft's monopoly products and that threaten to impose serious economic harm on their ability to compete in the marketplace.

Joint Movants do *not* claim that their interests are impaired merely because "the proposed consent decree does not advance the interests of [their] members to the extent [they] deem appropriate."²¹ The ability of Microsoft to engage in anticompetitive conduct, which we do not believe is adequately restrained by decree, adversely affects our businesses. That is a serious harm whether or not the decree includes any of the *additional* provisions Joint Movants believe are warranted. Additionally, CCIA and SIIA both made specific procedural claims against approval of the settlement based on the lack of supporting documentation released by the government and Microsoft.²² In *Massachusetts School of Law*, the Court permitted intervention as of right based precisely on such objections. 118 F.3d at 781-82.

Joint Movants respectfully suggest our concerns should not automatically be dismissed just because some of our members compete with Microsoft. Our views and testimony were of substantial importance in the liability judgment and its affirmance by the Court of Appeals. Moreover, as the Court held, this remedy does not terminate Microsoft's monopoly. *See* Slip Op. at 9 n.3. As a result, virtually all of today's personal computer industry is therefore depend-

²¹ *See* Memorandum Opinion and Order, No. 98-1232, at 3 (D.D.C. Feb. 28, 2002) ("ProComp Order").

²² *See, e.g.*, SIIA Comments at 8-9; note 19, *supra* (collecting citations).

ent on a relationship with Microsoft’s dominant platform(s). In this context, Joint Movants are in the best position to know whether the decree provisions aimed at ensuring interoperability can be effective. Our members are in the best position to evaluate whether the OEM flexibility provisions would practically reduce Microsoft’s market power, and thus pave the way over time for non-Microsoft software. Our members are also in the best position to know whether ISVs would ever write to platforms other than Microsoft under the decree’s regime.

These are not interests of “whiny competitors” seeking an artificial advantage as a result of onerous decree provisions. As Judge Robert Bork explained in an *amicus* brief to this Court:

The homily that the antitrust laws protect “competition not competitors” cannot be used to divorce antitrust remedies from the real world, in which competition necessarily requires competitors. . . . Our views are supported by several renowned Nobel-laureate economists, expert remedy witnesses for the government in this very case, former officials of the Antitrust Division, and numerous antitrust scholars, consumers and “think tanks,” none of whom has anything to gain competitively in the outcome. . . . *Any advantage gained by [our] members from a remedy in this case will come, if at all, only by competing in the marketplace. That is as it should be. Our members welcome the opportunity for a fair fight.*

ProComp Reply Brief at 24-25 (emphasis supplied).

3. No Other Parties Will Adequately Represent Joint Movants’ Interest

Because the Court has approved the decree and entered a ruling that both the government and Microsoft deem satisfactory, there remain no parties that will further Joint Movants’ interest in this matter. As explained, several vitally important issues regarding the adequacy of the judgment remain outstanding in the matter; the Justice Department will not pursue these issues. Absent third-party intervention at this time, these concerns will go unaddressed and Joint Movants will be precluded from ensuring that their competitive position in the computing and information marketplace is not further adversely affected.

This is quite different from a disagreement with the government as to whether the decree goes “far enough.” Joint Movants desire to appeal and the government does not. We believe the decree is affirmatively harmful and hopelessly circular, and the government does not. The Court agreed with the government on the merits, but in the post-judgment environment, the Justice Department cannot, by definition, “adequately” represent the interests of third-parties who fervently believe the judgment fails to meet accepted standards for Tunney Act or antitrust remedies. *See Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (inadequacy of representation may become apparent only at the appellate stage).

II. IMPORTANT JURISPRUDENTIAL REASONS WEIGH STRONGLY IN FAVOR OF GRANTING INTERVENTION

Beyond the literal parameters of Rule 24, the Court should grant intervention for purposes of appeal in accordance with its broad authority to ensure the fair administration of justice. The government’s action against Microsoft is the most far-reaching antitrust matter, both in terms of its economic importance and precedential value, in more than a generation. It is thus imperative that the outcome of this case endure the greatest possible judicial scrutiny in order that the public interest and the continued legitimacy of American antitrust doctrine are upheld.

We greatly respect the difficult nature of this case and the degree of effort expended by the Court in reaching its decision. The enormity of the task of setting the rules of the road for what some believe to be the most important, and fastest growing, sector of the economy cannot be overstated. Joint Movants certainly mean no disrespect at all to this Court when we suggest that this is precisely the type of case that warrants appellate review. The jurisprudential considerations in favor of allowing the D.C. Circuit to decide whether the decree entered meets the relief standards it articulated in its *en banc* opinion are overwhelming.

CONCLUSION

For all these reasons, the Court should grant this joint motion and permit CCIA and SIIA to intervene in this case for purposes of appealing the Court's Tunney Act decision.

Respectfully submitted,

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Dated: December 20, 2002

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